BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2021-143-E & 2021-144-E

In Re:	)	
Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	)	**POST-HEARING BRIEF OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, SOUTHERN ALLIANCE FOR CLEAN ENERGY, UPSTATE FOREVER, VOTE SOLAR, AND NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION**
Application of Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	)	

The South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Vote Solar, and North Carolina Sustainable Energy Association (collectively, "Clean Energy Intervenors") submit this brief in support of the Smart $aver Solar Programs ("Programs") proposed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, "Duke Energy" or "the Companies"). This brief will argue: (1) that the Programs are permissible energy efficiency and demand-side management ("EE/DSM") programs under S.C. Code Ann. §58-37-20 (the "DSM Statute") and that the Companies have met their burden of proof to show that the Programs are cost-effective and meet all other criteria for approval; and (2) that the lost revenue prohibition in S.C. Code Ann. §58-40-20(I) is limited in scope and inapplicable to the Companies' ability to recover net lost revenues for programs under the DSM Statute.

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ARGUMENT

A. The Smart $aver Solar Programs satisfy the requirements of S.C. Code Ann. §58-37-20 (the "DSM Statute").

i. The DSM Statute expressly permits utilities to offer demand-side programs that feature renewable energy technologies, including rooftop solar.

The Office of Regulatory Staff ("ORS") has claimed throughout these proceedings that the Commission must reject the Programs because they include an incentive for solar PV, and solar PV is "not energy efficiency." In support of its position, ORS points to definitions of energy efficiency from the Energy Information Administration, the Environmental and Energy Study Institute, and the statute governing North Carolina's EE/DSM programs. But South Carolina law governs these proceedings—not other states or federal entities—and ORS's position is completely at odds with the unambiguous statutory language under the governing South Carolina statute.

The DSM Statute, codified in S.C. Code Ann. §58-37-20, is the source of the Commission's authority over utility energy efficiency and demand-side management ("EE/DSM") programs. The DSM Statute authorizes the Commission to adopt procedures that "provide incentives and cost recovery for energy suppliers and distributors who invest in *energy supply* and end-use technologies that are cost-effective, environmentally acceptable, and reduce energy consumption or demand." S.C. Code Ann. §58-37-20 (emphasis added). It is uncontroverted that the customer solar component of the Solar Saver program proposed in this docket is an "energy supply" technology that is "environmentally acceptable," reduces demand on the utility system, and—as discussed in more detail below—is cost-effective. Indeed, it is hard to imagine a technology that better fits this portion of the statute under which Duke's application was filed; incentivizing the growth of cost-effective customer solar technology is not merely allowed under the DSM statute, but prioritized by the statute's renewable energy and energy supply provisions.

The statute further provides that utilities must be permitted cost recovery and an opportunity to earn a reasonable rate of return on their "investment in qualified *demand-side* management programs." S.C. Code Ann. §58-37-20. The DSM Statute then defines "demand-side activities" to include a wide variety of technologies, stating:

> For purposes of this section only, the term "demand-side activity" means a program conducted by an electrical utility or public utility providing gas services for the reduction or more efficient use of energy requirements of the utility or its customers including, but not limited to, utility transmission and distribution system efficiency, customer conservation and efficiency, load management, cogeneration, *and renewable energy technologies.*

Id. (emphasis added). At the hearing, ORS suggested that this definition of "demand side activities" was inapplicable to the preceding phrase "demand-side management programs," even though the definition itself specifies that the definition is "for purposes of [that] section only."[1] Moreover, the same definition that includes "renewable energy technologies" as an approved demand-side activity is provided at the outset of this chapter and the term "demand-side activity" is used throughout the chapter to refer to allowable EE/DSM programs. S.C. Code Ann. §58-37-10(1). ORS's interpretation is at odds with the plain language of the statute and would render the inclusion of "renewable energy technologies" in the DSM Statute entirely superfluous, contrary to South Carolina law. *State v. Sweat*, 386 S.C. 339, 351 (2010) (affirming that "a statute should be construed so

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[1] Redirect Examination of ORS Witness Morgan by ORS Attorney Mustian (after confirming that Witness Morgan was asked questions about the definition of "demand side activities" within S.C. Code Ann. §58-37-20, Mr. Mustian asked,"Do you see that term ["demand-side activity"] used anywhere else in 58-37-20?").

that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous").

ORS also opposes the programs because solar PV reduces energy usage and demand at the system level, rather than at the equipment level; indeed, ORS Witness Horii repeatedly stated this as a key reason for his opposition to the Programs. But this, too, is contrary to the DSM Statute's requirement that "demand-side activities" must be for the "reduction or more efficient use of energy requirements *of the utility **or** its customers*." *Id.* (emphasis added). Again, ORS's dispute seems to be with the South Carolina DSM Statute itself, rather than the Programs' compliance with that statute. It is undisputed that solar customers' behind-the-meter self-consumption reduces energy demand on the Companies' systems, and it does so in a way that—from the utility's perspective—mimics reductions that occur from the installation of other EE/DSM measures.

Further, whether solar PV falls within common definitions of EE is a purely semantic argument that has no bearing on the substance of this proceeding. Under South Carolina law, the DSM Statute provides that where utilities invest in qualified "demand-side activities" they are entitled to recover their costs for those programs as authorized by statute and delineated in the Companies' EE/DSM Mechanism, which the Commission approved in Order Nos. 2021-32 and 2021-33. The Companies could have—without changing any substantive aspect of the Programs whatsoever—called the Programs "demand-side activities" authorized by the DSM Statute, and doing so would render ORS's claim that the Programs are not EE completely meaningless. Put simply, the lawfulness of the Programs does not turn on whether or not they meet common definitions of EE, but rather whether the Programs are eligible "demand-side activities" that satisfy the requirements of the DSM Statute and the EE/DSM Mechanism.

As such, it is clear that under South Carolina law, utilities may include energy supply technologies generally—and renewable energy technologies specifically— within the EE/DSM framework. As ORS itself acknowledged, rooftop solar is such an "energy supply" technology. It may therefore be offered as part of an EE/DSM program in South Carolina so long as certain requirements are met, and as discussed below, the Programs clearly meet those requirements.

ii. The Companies have more than met their burden of proof of showing that the Programs are cost-effective, environmentally acceptable, and will reduce energy demand from the utility.

The DSM Statute provides that utility cost recovery is required where they invest in measures that are "cost-effective, environmentally acceptable, and that reduce energy consumption or demand." *Id.* The Companies bear the burden of showing, by a preponderance of the evidence, that the Programs satisfy these requirements and should be approved.[2] In this case, the Companies have more than met this burden. The evidence in this proceeding is clear that these Programs will generate substantial cost savings for the Companies' ratepayers.

The Companies conducted cost-effectiveness screening for the Programs in accordance with the requirements of the EE/DSM Mechanism that was agreed to by ORS and approved by this Commission. Under the EE/DSM Mechanism, EE/DSM programs that score above a 1.0 on the Utility Cost Test ("UCT") are deemed to be cost-effective.

[2] S.C. Code Ann. § 1-23-600(A)(5) ("Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence."). The preponderance of the evidence is evidence that convinces the fact finder as to its truth. *Pascoe v. Wilson*, 416 S.C. 628, 640, 788 S.E.2d 686, 693 (2016).

Here, the proposed Programs scored well above a 1.0 on the UCT for both Duke Energy Carolinas and Duke Energy Progress. Indeed, when customers' required participation in the Winter BYOT program is accounted for, the UCT cost-effectiveness score for the Programs is 2.75, meaning that customers are projected to save $2.75 for every dollar paid into the EE/DSM rider. Tr. Vol. 3, p. 576.14, l. 10.

The Companies conducted cost-effectiveness screening for the Programs in the same manner as for their other EE/DSM programs: they used established practices and methods to estimate the reductions in system energy usage that would result from customers' behind-the-meter consumption. Then, the Companies looked at the cost savings from those reductions in energy usage and the reductions in peak demand. The *only* distinction here is that the Programs involve rooftop solar—but from the perspective of the utility, reductions in usage from behind-the-meter energy consumption are no different than reductions in usage from a new water heater or insulation. And in fact, the Companies took numerous steps to ensure that their cost-effectiveness assumptions were conservative in nature; after all, if the savings from the Programs do not materialize, the Companies would not be able to recover their costs to offer them. The Companies' cost-effectiveness results for the Programs are data-driven and in compliance with the well-established requirements for cost-effectiveness established by this Commission.

In contrast, ORS's claims are based on unsubstantiated conclusions. ORS contends that the Programs would somehow not result in *any* savings for customers, relying on a series of extremely unlikely and unreasonable assumptions and are simply unpersuasive. For ORS to prevail in this proceeding, the Commission would have to determine that:

- Solar PV is not an eligible technology under the DSM Statute, even though the statute itself allows for the inclusion of "energy supply technologies," including "renewable energy technologies."
- The Companies should have used the Total Resource Cost ("TRC") test as the primary cost-effectiveness determinant for the Programs, even though doing so would be contrary to the EE/DSM Mechanism which was approved by this Commission following a settlement agreed to by ORS.
- Even though the UCT measures the utility costs that are ultimately passed on to ratepayers, and the Programs pass UCT showing cost savings by a two-to-one margin, the Programs would paradoxically cost the Companies' ratepayers money.
- The same cost-effectiveness screening and EM&V practices that the Companies have used to evaluate their EE/DSM programs for years would somehow be ineffective for these Programs, and these Programs alone.
- The Companies should have to use a novel and untested distribution-level screening mechanism for this Program even though ORS has never before questioned the methodology used by the Companies to evaluate avoided transmission and distribution costs.

In sum, the Companies have more than satisfied the burden of proof in these proceedings that the Programs satisfy all the requirements of the DSM Statute and will result in substantial cost savings to ratepayers.

B. S.C. Code Ann. §58-47-20(I) does not prohibit a utility from collecting net lost revenues for programs that satisfy the requirements of S.C. Code Ann. §58-37-20.

ORS argues that Act 62 prohibits Duke from recovering net lost revenues for the Smart $aver Solar Programs. In particular, ORS points to S.C. Code Ann. §58-47-20(I), which provides as follows:

> Nothing in this section, however, prohibits an electrical utility from continuing to recover distributed energy resource program costs in the manner and amount approved by Commission Order No. 2015-194 for customer-generators applying before June 1, 2021. Such recovery shall remain in place until full cost recovery is realized. Electrical utilities are prohibited from recovering lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021.

However, rather than being some kind of blanket prohibition on all lost revenue recovery for EE/DSM programs that may be "associated" with customer-generators, S.C. Code Ann. § 58-40- 20(I) refers to the type of lost revenue identified in that very same provision, the "recovery of lost revenues in the manner and amount approved by Order No. 2015-194." This provision of Act 62 is inapplicable to the recovery of *net* lost revenues for utility-offered programs that satisfy the requirements of the DSM Statute.

i. <u>The DSM Statute allows utilities to recover their costs where they expend resources to expand customer adoption of technologies that reduce energy demand and save ratepayers money.</u>

While EE/DSM measures benefit ratepayers by keeping system costs down, they lower customers' energy purchases from a utility and therefore reduce utility revenue. As a result, utilities have no inherent financial incentive to offer them; indeed, the more successful a utility is at achieving savings through EE/DSM programs, the larger the hit to the utility's bottom line. For this reason, the vast majority of states have legislative or policy frameworks in place to incentivize utility development of EE/DSM programs.[3]

As such, the purpose of South Carolina's DSM statute is to harmonize the financial incentives of the utility with ratepayer interests. The DSM statute provides that where a utility invests in consumer technologies that reduce energy demand, they must be allowed to recover their costs for doing so—including net lost revenues—and obtain a reasonable rate of return on its investment. S.C. Code Ann. §58-37-20 (providing that procedures must "allow energy suppliers and distributors to recover costs and obtain a reasonable rate of return on their investment in qualified demand-side management programs sufficient to make these programs at least as financially attractive as construction of new generating facilities," and that the Commission must establish rates and charges that ensure that the net income of an electrical utility that implements cost-effective EE/DSM programs is "at least as high as the net income would have been if the energy conservation measures had not been implemented"). As noted above, the DSM Statute defines "demand-side activities" broadly to include energy supply and renewable energy technologies so long as they are cost-effective, environmentally acceptable, and reduce energy consumption or demand. *Id.*

Inherent in the DSM mechanism is the concept that a utility is only allowed to recover these costs where it *expends resources* to invest in cost-effective technologies and where such actions *expand* adoption of these technologies beyond what would occur in the general market. Most demand-side technologies, such as LED light bulbs, are available

[3] *See*, M. Cleveland et al., Nat'l Conference of State Legislatures*, State Policies for Utility Investment in Energy Efficiency* at 2 (Apr. 2019), available at https://www.ncsl.org/Portals/1/Documents/energy/Utility_Incentives_4_2019_33375.pdf?ver=2019-04-04-154310-703.

outside of utility-offered programs, and utilities are not protected from any revenue reductions that occur due to independent customer adoption of these technologies. For instance, if a customer purchases a new, more efficient HVAC unit outside of a utility-offered program, the utility is not entitled to recover any resulting lost revenues. In fact, the evaluation, measurement, and verification ("EM&V") process includes a step—the net to gross calculation—to verify that utilities are only compensated for savings that would not have resulted absent the utility program.

But, where a utility expends resources—such as through an incentive or customer outreach—to offer programs that *expand* the adoption of cost-saving technologies, including renewable energy technologies, they are entitled to cost recovery and an opportunity to earn a return on that investment. *See* S.C. Code Ann. §58-37-20.

ii. <u>The purpose of S.C. Code Ann. §58-47-20(I) is to end utility lost revenue collection under Order No. 2015-194, which insulated utilities from the effects of the rooftop solar market; it does not prohibit utility cost recovery for programs that are authorized under the DSM statute.</u>

The prohibition on lost revenue recovery in S.C. Code Ann. §58-47-20(I) can be viewed in a similar context, and should not be read to prevent a utility from collecting net lost revenues for programs authorized under the DSM Statute.

When Act 236 was enacted in 2014, it set out a framework where customers had a right to participate in net metering, and utilities, in turn, could recover the "costs" of providing net metering service to those customers. S.C. Code Ann. §58-40-20 (2014). The term "lost revenues" did not appear in Act 236 at all; that term originated in the settlement approved in Order 2015-194. That Order defined the "costs" a utility could collect from net metering customers as "lost revenues," a defined category meaning the difference between the value of solar, as determined by an 11-factor test, and the bill savings net metering customers enjoyed.

Under that framework, Order No. 2015-194 enabled utilities to recover *all* lost revenues associated with customer generators—including both exports and behind the meter consumption—and to do so *automatically*, regardless of whether the utility played a role in a customer adopting solar. This earlier net metering framework was intended to jump-start and help build the nascent solar market in South Carolina, and its effect was to insulate utilities from revenue impacts that would occur due to customer-generator bill savings (both exports and behind-the-meter consumption).

The enactment of Act 62 marked a policy shift from the Act 236 approach to market-based adoption of rooftop solar in South Carolina. *See* S.C. Code Ann. §58-40-20(A)(1). Act 62 repealed and replaced Act 236's net metering provisions and set out a new framework: for customer-generators that applied before June 1, 2021, Order No. 2015-194 would continue to govern both customer net metering service, S.C. Code Ann. §58-40-20 (B), and utility lost revenue recovery for those customer-generators. S.C. Code Ann. §58-40-20(I). But for customer-generators who enroll on or after June 1, 2021, the Commission was directed to approve Solar Choice net metering tariffs that would "eliminate any cost shift to the greatest extent practicable" by ensuring rates were based on the utility's actual cost to serve customer-generators, taking into account the benefits those customers provide to the system. S.C. Code Ann. §58-40-20(F)(3)-(G)(2).[4] S.C. Code Ann. §58-40-20(I) thus specifies that, for customers taking under those Solar Choice tariffs, the

[4] For that reason, the Commission was also directed to open a generic docket to evaluate the costs and benefits of net metering, including the "cost-of-service implications of customer-generators on other customers within the same class" and "the value of the energy produced by customer-generators." S.C. Code Ann. §58-40-20(C)-(E).

utilities would be prohibited from collecting lost revenues in the manner they had under the earlier Act 236 framework.

In this context, it is apparent that S.C. Code Ann. §58-40- 20(I) should be read to disallow the type of lost revenue recovery referenced earlier in that same provision: cost recovery as authorized under Order No. 2015-194, which as noted earlier, was the source of the term "lost revenues" in the first place. Because Order No. 2015-194 authorized "lost revenue" recovery in a manner that insulated utilities from the effects of the rooftop solar market, it was contrary to Act 62's intent to "enable[e] *market*-driven, private investment in distributed energy resources across the State." S.C. Code Ann. §58-40-20(A)(1) (emphasis added). Thus, with the passage of Act 62, utilities would no longer be safeguarded against revenue impacts that result from customers entering the rooftop solar market, as is the general rule for other technologies.

However, as noted above, the DSM Statute carves out an exception to this general rule in certain circumstances: when utilities expend resources and offer programs that *expand* the market for technologies—including "renewable energy technologies"—in ways that reduce energy demand, lower system costs, and save ratepayers money. Indeed, the DSM Statute and Commission-approved EE/DSM Mechanism only allow collection of *net* lost revenues, which differ in kind from the lost revenues authorized under Order No. 2015-194. Under the EE/DSM Mechanism, a utility can only collect net lost revenues, meaning net savings that occur due to the utility program and which are *additional to* savings that would have occurred in the general market. Programs must go through cost-effectiveness testing before they are approved, and program savings must be verified through the EM&V process for the utility to actually collect net lost revenues or the performance incentive authorized by the EE/DSM Mechanism. These robust cost-effectiveness and evaluation requirements ensure that the utility is only entitled to cost recovery when they make wise investments in programs that result in actual cost savings to the benefit of ratepayers, and serve to easily set cost recovery under the DSM Statute apart from "lost revenue" recovery under Order No. 2015-194, where no such requirements apply.

In sum, when read together, Act 62 (specifically, S.C. Code Ann. §58-40-20(I)) and the DSM Statute should be interpreted as prohibiting utilities from collecting lost revenues from customer-generators in the manner and amount authorized under Order No. 2015-194, but allowing net lost revenue recovery for utility programs that meet the requirements of the DSM Statute and EE/DSM Mechanism. That interpretation is consistent with the General Assembly's express intent to make "renewable energy technologies" eligible demand-side activities under the DSM Statute, its decision to leave S.C. Code Ann. §58-37-20 unchanged with the enactment of Act 62, and the underlying context and intent of both statutes.

In contrast, to read a conflict into these provisions in the manner ORS contends is to suggest that the General Assembly intended to prohibit utilities from offering programs designed to save ratepayers money.

iii. <u>ORS's interpretation of S.C. Code Ann. §58-40-20(I) ignores this broader statutory context and would lead to absurd results.</u>

ORS's position that S.C. Code §58-40-20(I) prohibits utilities from collecting any lost revenues associated with customer-generators, even net lost revenues from an eligible EE/DSM program, not only ignores the clear language of the DSM statute, but also raises numerous difficult questions.

First, the DSM statute explicitly includes "renewable energy activities" within the definition of "demand side activities" for which utilities can recover net lost revenues. However, if ORS's interpretation is correct, why did the General Assembly not also amend the definition of "demand side activities" in the DSM Statute to exclude renewable energy from the list of acceptable demand side programs? *See Hodges v. Rainey*, 533 S.E.2d 578, 583 (2000) ("It is presumed that the Legislature is familiar with prior legislation and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first."). It defies basic rules of statutory construction to construe the language in Act 62 as some kind of oblique limitation on EE/DSM net lost revenue recovery. Had the General Assembly intended to foreclose renewable energy programs from allowable demand side activities for which the utility can recover net lost revenues, it would have done so explicitly in the DSM Statute. Indeed, as discussed above, ORS's interpretation would render the inclusion of "renewable energy technologies" in the DSM Statute entirely meaningless, contrary to South Carolina law. *See Sweat*, 386 S.C. at 351.

Logically, ORS's interpretation would also mean that Duke is prohibited from collecting net lost revenues associated with customer generators under any circumstances, even if they are participating in some other Commission approved DSM program. After all, those net lost revenues would be "associated with customer-generators" as well, and ORS has provided no logical explanation for why such recovery would be prohibited for the Smart $aver Solar Programs but permissible for any other EE/DSM program in which a customer generator is enrolled.

In sum, ORS's interpretation would require the Commission to ignore the explicit language of the DSM Statute that allows utilities to offer EE/DSM programs featuring renewable energy technologies and to recover associated net lost revenues; the context of Act 62 and the DSM statute make clear that such a conflict is unnecessary and contrary to the language and intent underlying both statutes, and should be rejected.

CONCLUSION

ORS's claim that Solar PV cannot be included in an EE/DSM program effectively asks this Commission to ignore governing South Carolina law and instead look to other states' laws and outside definitions. The DSM Statute governing utility-offered EE/DSM programs in South Carolina expressly provides that renewable energy technologies can be included in EE/DSM programs and are thus eligible for utility cost recovery under the terms of the Commission-approved EE/DSM Mechanism. The lost revenue prohibition in S.C. Code Ann. § 58-40-20(I) is limited in scope and simply inapplicable to utilities' cost recovery for programs that meet the requirements of the DSM Statute. The Companies have more than satisfied their burden of showing that the Program is cost-effective, that it will reduce energy demand on the system, and ultimately, that it will save ratepayers money. The proposed Programs meet the letter and spirit of both the DSM Statute and Act 62, and will meet the goals of those statutes to reduce demand on the utility system, keep customer costs down, and expand customer access to rooftop solar. For those reasons, Clean Energy Intervenors respectfully request that the Commission approve the Programs proposed by the Companies in these proceedings.

Respectfully submitted this 3rd day of December 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the *Post-Hearing Brief of South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, North Carolina Sustainable Energy Association, Vote Solar and Upstate Forever.*

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This 3rd day of December, 2021.
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